PBI CIVIL LITIGATION UPDATE 2019

Developments in Pennsylvania Civil Procedure and Practice

JUSTIN T. ROMANO
ATTISANO & ROMANO, LLC
WWW.ARLAWPITT.COM

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New(ish) Rule – Confidential Filings – 205.6

- Confidential Information and Documents
  - Certificate of Compliance required
  - "I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents."

New Rule – Unknown Defendant – 2005

- Only applies to *in personan* actions
- May designate an unknown defendant if:
  - Actual name unknown after "reasonable search with due diligence;"
  - "Doe" designation averred to be fictitious;
  - Factual description of unknown defendant averred with "sufficient particularity for identification;" *and*
  - Averment that "reasonable search to determine the actual name has been conducted"

New Rule – Unknown Defendant – 2005

- Within 20 days of identifications of actual defendant, file motion to amend complaint
- Must attach affidavit "describing the nature and extent of the investigation that was made to identify the the defendant, and the date upon and manner in which the defendant's actual name was identified"
- Court *shall* granted unless failure to exercise due diligence

New Rule – Unknown Defendant – 2005

- Defendant identified pursuant to this procedure may respond by Preliminary Objection challenging compliance
- No subpoena without leave of court – court weighs importance vs. burden
- No final judgment may be entered against a a defendant designate by a “Doe” designation

New Comment – Commencement of Action – 1007

- COMMENT: Rule 2005(b) does not authorize the filing of a *praecipe* for a writ of summons if an unknown defendant is to be identified by a "Doe" designation.

Amended Rule – Caption – 1018

- "The caption of a complaint shall set forth the form of the action and the names of all parties, including a Doe designation for an unknown defendant as provided in Rule 2005, . . ."

Amended Rule – Amendment – 1033

- "(c) An amendment substituting the actual name of a defendant for a Doe designation as provided in Rule 2005 relates back to the dates of commencement of the action if, within the time provided by Rule 401 for service, the defendant named by the amended has received actual or constructive notice of the commencement of the action such that it will not be prejudiced in maintaining a defense on the merits and the defendant knew or should have known that the action should have been brought against it but for lack of knowledge of defendant's actual name"

Trial Record -- Consideration on Appeal

- *Neshannock v. Kirila Contractors, Inc., 181 A.3d 467 (Pa.Commw. 2018)*
  - Breach of contract dispute between township and contractor.
  - In its analysis, the Commonwealth Court held that—despite stipulation by the parties—it could not consider deposition transcript excerpts and proposed exhibits which were not a part of the certified record.
  - *When in doubt, make it a part of the record!*

Interlocutory Appeal -- Arbitration

- *Griest v. Griest, 183 A.3d 208 (Pa.Super. 2018)*
  - In this dispute over real property, Preliminary Objections were filed to the Counterclaim, seeking to compel arbitration pursuant to a written agreement existing between the parties. The trial court overruled the POs.
  - Superior Court noted that an order overruling preliminary objections is interlocutory and not appealable as of right. **There exists a narrow exception when an appeal is taken from an order denying a petition to compel arbitration.** This is a threshold, jurisdictional determination.

Interlocutory Appeal -- Arbitration

- *Griest v. Griest, 183 A.3d 208 (Pa.Super. 2018)*
  - Analysis of arbitration clause:
    - First, an agreement to arbitrate must exist.
    - Second, the dispute must be within the scope of the agreement.
  - Under this test, the case at hand was subject to arbitration. Accordingly, the Court reversed and remanded.

Preserving Issues – Post-trial Motions

- *G&G Investors, LLC v. Phillips Simmons Real Estate Holdings, LLC, 183 A.3d 472 (Pa.Super. 2018)*
  - Investor seeking to be appointed conservator of an unoccupied property owned by a real estate holding company. A hearing was held during which the parties gave opening statements and presented testimony and other evidence.
  - In determining whether a trial occurred which would trigger the requirements of Rule 227.1 to preserve issues for appeal, the Superior Court considered whether:
    - (1) the plain language of Rule 227.1 makes clear a post-trial motion is necessary;

Preserving Issues – Post-trial Motions

- *G&G Investors, LLC v. Phillips Simmons Real Estate Holdings, LLC, 183 A.3d 472 (Pa.Super. 2018)*
  - (2) case law provides a post-trial motion is necessary, even if Rule 227.1 is silent on the subject; and
  - (3) practicing attorneys would reasonably expect a post-trial motion to be necessary.
  - Case law required a post-trial motion following a proceeding where the court heard new testimony and received new evidence upon which it relied in making its decision. The failure of appellant to file a post-trial motion in this case resulted in a waiver.

Preserving Issues – Post-trial Motions

- *Bennett v. Rose, 183 A.3d 498 (Pa.Commw. 2018)*
  - After bench trial, landlord filed a Motion for Reconsideration and then subsequently a Notice of Appeal.
  - In response, the trial court ordered landlord to file a 1925(b) Statement. The trial court issued an opinion noting that landlord's failure to file post-trial motions pursuant to Rule 227.1 resulted in a waiver of issues for appeal.
  - The Commonwealth Court held that because the Motion for Reconsideration requested relief in accordance with Rule 227.1(a)(4), and provided specific allegations of error, it was functionally a post-trial motion and no waiver occurred.

Interlocutory Appeal – Attorney-Client Privilege

- *Knopick v. Boyle, 189 A.3d 432 (Pa.Super. 2018)*
  - In this legal malpractice action, law firm appealed trial court order to produce e-mail of former employee who was responsible for reconciling the firm's trust account. The basis of withholding the requested documents was the attorney-client privilege.
  - The Superior Court noted that in the absence of unusual circumstances, appellate courts will not review discovery or sanction orders prior to final judgment. However, in this case, because the trial court ordered production, the collateral order rule applied.

Interlocutory Appeal – Attorney-Client Privilege

- *Knopick v. Boyle, 189 A.3d 432 (Pa.Super. 2018)*
  - In reviewing whether the disputed material was privileged, the Superior Court observed that it was not created as a confidential communication to an attorney. Rather, it was a contemporaneous note from the employee to himself intended to record a moment in time.
  - Finally, the Superior Court noted that the creator of the requested information is the holder of the privilege and the holder had not asserted the privilege.

Raising Issues on Appeal – Waiver

- *Davis v. Borough of Montrose, 194 A.3d 597 (Pa.Super. 2018)*
  - After prevailing in a lease dispute, lessor appealed arguing that the lessee had failed to remediate a mold situation and provide notice of said condition.
  - This argument consisted of "two lengthy paragraphs" but failed to cite to any law or rule in support of its position.
  - Superior Court relied upon Rule 2119(a) holding that the failure to cite to relevant authority constitutes a waiver of issue on appeal.

Preserving Issues – JNOV

- *Corvin v. Tihansky, 184 A.3d 986 (Pa.Super. 2018)*
  - At the conclusion of the trial over a rear-end MVA, the jury found that defendant's negligence was not a factual cause of harm to plaintiff.
  - The trial court denied plaintiff's Motion for Judgment Notwithstanding the Verdict or for a new trial.
  - On appeal, the Superior Court held that a *motion for directed verdict is required* as a prerequisite to a post-trial motion for JNOV based on the state of the evidence.

Preserving Issues – JNOV

- *Corvin v. Tihansky, 184 A.3d 986 (Pa.Super. 2018)*
  - The Court noted that "this approach has the salutary effect of submitting the issue to the trial judge for initial evaluation during trial, when the proofs are still fresh."
  - The Superior Court also noted that plaintiff's counsel waived the issue by withdrawing a request for a binding jury instruction.

Nonsuit – Waiver

- *Tong-Summerford v. Abington Memorial Hospital, 190 A.3d 631(Pa.Super. 2018)*
  - Medical malpractice action alleging that a feeding tube had been improperly placed into patient's lung, rather than stomach, and resulted in patient's demise.
  - The jury awarded $5,000,000, which the trial court molded to include delay damages.
  - At the close of plaintiff's case, defendants moved for a partial nonsuit, which the trial court denied. Defendant then proceeded to present evidence.

Nonsuit – Waiver

- *Tong-Summerford v. Abington Memorial Hospital, 190 A.3d 631(Pa.Super. 2018)*
  - The Superior Court held that in light of defendant's presentation of evidence, the trial court's denial of the motion for nonsuit was moot and unappealable.
  - The Superior Court next considered the trial court's denial of defendant's Motion for JNOV, holding that the evidence was sufficient for a jury to find that defendant violated the standard of care.

Nonsuit – Waiver

- *Tong-Summerford v. Abington Memorial Hospital, 190 A.3d 631(Pa.Super. 2018)*
  - The court also noted that "[a] theory of error different from that presented to the trial jurist is waived on appeal, even if both theories support the same basic allegation of error which gives rise to the claim for relief."
  - Finally, defendant challenged the damage award because no evidence of economic loss was presented. The court determined that, in consideration of the record, the damage award was "within uncertain limits of fair and reasonable compensation."

Final Order – Attorney's Fees

- *Carmen Enterprises, Inc. v. Murpenter, 185 A.3d 380 (Pa.Super. 2018)*
  - A breach of contract dispute between the parties proceeded to a bench trial. The court awarded $45,057.47 in breach of contract damages.
  - Plaintiff filed a motion to mold the verdict to include attorney's fees in excess of one million dollars. The trial court awarded $450,400 in attorney's fees pursuant to the contract in dispute. Cross-appeals were filed.

Final Order – Attorney's Fees

- *Carmen Enterprises, Inc. v. Murpenter, 185 A.3d 380 (Pa.Super. 2018)*
  - The Superior Court observed that the burden in justifying a fee request is on the claimant. Further, "[f]ees should be on the moderate scale of compensation, and none should be allowed but such as are fair and just."
  - The trial court, *sua sponte*, reduced claimant's rate from $450/hour (the rate he had previously charged as a patent lawyer in Philadelphia) to $200/hour, noting that this was decidedly not a patent case.
  - The Superior Court ultimately affirmed the trial court's reduction in the fee award.

Jury Selection – Disqualification of Jurors (Allegheny County)

- *Trigg v. Children's Hospital of Pittsburgh, 187 A.3d 1013 (Pa.Super. 2018)*
  - In this medical malpractice action, the plaintiff, who lost at trial, challenged the jury selection process in Allegheny County.
  - Historically, a court clerk assigned by the Calendar Control Judge, rather than the trial judge, has been tasked with overseeing jury selection. It was the responsibility of the clerk to note any challenges and then, after interviewing all potential jurors, the attorneys and clerk would appear before the Calendar Control Judge to argue with respect to challenges for cause. *Voir dire* could be recreated at the Judge's discretion.

Jury Selection – Disqualification of Jurors (Allegheny County)

- *Trigg v. Children's Hospital of Pittsburgh, 187 A.3d 1013 (Pa.Super. 2018)*
  - One of the bases of the appeal was the trial court's inability, under the current system, to assess the credibility of a juror in the absence of firsthand observation of the juror's responses to questions probing bias.
  - The Superior Court relied upon this deficiency in dismissing the Hospital's argument relying upon the *McHugh* deference standard. The Court held that a judge's personal assessment of a potential juror is essential because it justifies "faith in the trial's court's ruling on challenges for cause."
  - The Superior Court further noted that even the "slightest ground of prejudice is sufficient" to disqualify a potential juror.

Jury Selection – Disqualification of Jurors (Allegheny County)

- *Trigg v. Children's Hospital of Pittsburgh, 187 A.3d 1013 (Pa.Super. 2018)*
  - Where do we stand?
  - Committee of judges and lawyers selected to review.

Request for Admission – Withdrawal

- *Joers v. City of Philadelphia, 190 A.3d 797 (Pa.Commw. 2018)*
  - Prior to trial on this pedestrian-MVA case, the court deemed requests for admission related to vicarious liability admitted. Plaintiff prevailed at trial.
  - The Commonwealth Court noted that under Rule 4014(d), a trial court should allow withdrawal of admissions resulting from a failure to timely respond and not deem the matters admitted "where upholding the admission would practically eliminate any presentation of the merits of the case; where withdrawal would prevent manifest injustice; and where the part who obtained the admissions failed to prove that withdrawal would result in prejudice to the party."

Request for Admission – Withdrawal

- *Joers v. City of Philadelphia, 190 A.3d 797 (Pa.Commw. 2018)*
  - Granting judgment on deemed admissions is reversible error where there is no bad faith by the responding party or prejudice from the delay to the party who sought the admissions.
  - In this case, the Commonwealth Court found that the delay was prejudicial to plaintiff. The responses to requests for admission were not just late, but served after the discovery period had closed and trial was imminent.

Spoliation – Sanction

- *Hammons v. Ethicon, Inc., 190 A.3d 1248 (Pa.Super. 2018)*
  - This case involved a products liability claim over pelvic mesh. A discovery dispute over the destruction of thousands of documents possessed by high-ranking employees of the manufacturer of the product. The manufacturer claimed the destruction was "inadvertent."
  - The trial court permitted a witness to testify regarding the missing documents without any instruction. The manufacturer argued on appeal that this amounted to a sanction.
  - On review, the Superior Court provided a lengthy analysis of the law on spoliation:

Spoliation – Sanction

- *Hammons v. Ethicon, Inc., 190 A.3d 1248 (Pa.Super. 2018)*
  - The existence of a duty by a plaintiff responsible for spoliation of evidence to preserve such evidence is established where: (1) the plaintiffs knows that litigation against the defendants is pending or likely; and (2) it is foreseeable that discarding evidence would be prejudicial to the defendants.
  - Evaluating the degree of fault of a party responsible for spoliation of evidence requires consideration of two components: (1) the extent of the offending party's duty or responsibility to preserve the relevant evidence; and (2) the presence or absence of bad faith.

Spoliation – Sanction

- *Hammons v. Ethicon, Inc., 190 A.3d 1248 (Pa.Super. 2018)*
  - A trial court weighs three factors in deciding upon an appropriate penalty for spoliation of evidence: (1) the degree of fault of the party or altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) whether there is lesser sanction that will avoid substantial unfairness to the opposing party and, where the offending party is seriously at fault, will serve to deter such conduct by others in the future.

Spoliation – Sanction

- *Hammons v. Ethicon, Inc., 190 A.3d 1248 (Pa.Super. 2018)*
  - Ultimately, the Superior Court held that the trial court acted within its discretion in permitting testimony regarding the destruction of the documents at issue. It also found that the probative value of the evidence outweighed the potential prejudice.
  - Also of note, the court observed that noneconomic loss in personal injury cases must be measured by experience rather than any mathematical formula.
  - The verdict was ultimately affirmed.

Preserving Issues – Points for Charge

- *Jones v. Ott, 191 A.3d 782 (Pa. 2018)*
  - In this case involving a MVA, plaintiff's counsel filed written Points for Charge with the Prothonotary, including three instructions on negligence *per se*.
  - Subsequently, a charge conference was held which was not transcribed.
  - The trial judge did not instruct the jury on negligence *per se*, however, the judge did provide counsel with an opportunity to make a statement on the record with respect to the charge. Plaintiff's counsel stated "I have no issues with the charge, Your Honor."
  - The jury returned with a defense verdict. Plaintiff appealed.

Preserving Issues – Points for Charge

- *Jones v. Ott, 191 A.3d 782 (Pa. 2018)*
  - The Superior Court affirmed, holding that in the absence of a clear objection on the record, plaintiff's counsel waived any future challenge to the jury instructions. The court also noted that it was bound by an incomplete record because the charging conference had not been transcribed.
  - The Supreme Court granted review to assess whether a litigant preserves a jury-charge challenge pursuant to Rule 227.1 when, notwithstanding the failure to object to the charge at trial, proposed Points for Charge had been filed and the issue was raised in plaintiff's Post-Trial Motion.

Preserving Issues – Points for Charge

- *Jones v. Ott, 191 A.3d 782 (Pa. 2018)*
  - In its analysis, the Supreme Court noted that the purpose of requiring timely objections is to give the court an opportunity to cure them. The Court was unpersuaded by plaintiff's argument that the issue was preserved by filing of Points for Charge, holding that the "mere filing of a requested point for charge, standing alone, does not preserve and assertion of trial court error." **To preserve such an objection, a party must either lodge a contemporaneous objection or file a proposed point for charge, allow the trial court to rule, and *then* raise the issue in a post-trial motion.** Absent an explicit ruling, the filing of plaintiff's Points for Charge failed to preserve the issue. Plaintiff's counsel also declined to make an objection on the record when asked by the trial court.

Collateral Order Doctrine – *Lis Pendens*

- *Barak v. Karolizki, 196 A.3d 208 (Pa.Super. 2018)*
  - An alleged property owner file a quiet title action and also a *lis pendens*. The record owner filed a motion to strike the *lis pendens*.
  - The trial court held a "hearing" although no evidence of record was presented. In considering the motion, the court applied the preliminary injunction standard and struck the *lis pendens* instructing that the proceeds of sale of the property be deposited in an escrow account to ultimately be paid to the prevailing party in the litigation.

Collateral Order Doctrine – *Lis Pendens*

- *Barak v. Karolizki, 196 A.3d 208 (Pa.Super. 2018)*
  - The Superior Court noted initially that it must consider whether the order striking the *lis pendens* conferred jurisdiction. The Court held that the order was reviewable under both a case law and the collateral order doctrine.
  - Under the latter analysis, it was found that the order was "separable from and collateral to the main cause of action," involving a "right . . . too important to be denied review," and a "claim will be irreparably lost."
  - Striking the *lis pendens* would undermine county recording system by failing to buyers on notice of litigation involving property.

Collateral Order Doctrine – *Lis Pendens*

- *Barak v. Karolizki, 196 A.3d 208 (Pa.Super. 2018)*
  - The Superior Court also noted that a *lis pendens* is not a preliminary injunction as it in no way prevents or enjoins a sale. Accordingly, the trial court erred in applying the preliminary injunction standard.
  - The appropriate standard for striking a *lis pendens* has two parts: (1) whether the application of the doctrine is harsh or arbitrary and (2) whether the cancellation of the *lis pendens* would result in prejudice to the non-petitioning party.

Puffery – Legal Standard

- *Commonwealth v. Golden Gate National Senior Care LLC, 194 A.3d 101 (Pa. 2018)*
  - The Attorney General's Office ("OAG") sued several dozen nursing homes, filing a Complaint and Petition for Injunctive Relief raising a number of claims including several under the Unfair Trade Practices and Consumer Protection Law ("UTPCPL"). Upon filing of Preliminary Objections, the Commonwealth Court dismissed the Complaint and the OAG appealed.

Puffery – Legal Standard

- *Commonwealth v. Golden Gate National Senior Care LLC, 194 A.3d 101 (Pa. 2018)*
  - The crux of OAG's UTPCPL claim was that defendants used misleading advertising materials to deceived potential nursing home residents about the nature and quality of care provided.
  - OAG also alleged that these representations were knowing and that facilities were intentionally short-staffed to maximize profits.
  - The Commonwealth dismissed the claims relating to these statements finding that advertising materials included mere "puffery."

Puffery – Legal Standard

- *Commonwealth v. Golden Gate National Senior Care LLC, 194 A.3d 101 (Pa. 2018)*
  - In the Supreme Court's analysis of puffery, it noted two basic categories: (1) hyperbolic boasting that no reasonable consumer would believe; and (2) claims of superiority over a competitor's product.
  - Whether a statement is puffery is a question of fact to be resolved by the finder of fact except in the unusual case where the answer is so clear it may be decided as a matter of law.
  - The Court held that the statements were not so clear that this determination could be made as a matter of law.

Settlement – Enforcement

- *Kalmeyer v. Municipality of Penn Hills, --- A.3d ---, 2018 WL 5985610 (Pa.Commw. 2018)*
  - Petitioner sought to enforce a settlement in an action that had been discontinued 18 years earlier.
  - The original dispute was over a municipal ordinance which imposed a flat sewage fee.
  - A settlement agreement was ultimately reached—and memorialized in 1994 correspondence—by which Petitioner would be charged based upon usage, rather than the flat fee.
  - The Petitioner satisfied the docket.

Settlement – Enforcement

- *Kalmeyer v. Municipality of Penn Hills, --- A.3d ---, 2018 WL 5985610 (Pa.Commw. 2018)*
  - Subsequently. in 2008, the Municipality passed a new ordinance which included a flat sewage fee for users not connected to the public water line. This ordinance once again implicated Petitioner, motivating him to file a Petition to Enforce Settlement in 2012.
  - The Petition was filed in the original action.
  - The trial court denied the Petition on the ground that the original settlement did not include a promise not to impose a flat fee at some time in the future. Petitioner appealed.

Settlement – Enforcement

- *Kalmeyer v. Municipality of Penn Hills, --- A.3d ---, 2018 WL 5985610 (Pa.Commw. 2018)*
  - Upon review, the Commonwealth Court held that, absent a pending action or controversy, it did not have jurisdiction to adjudicate the Petition and remanded to the trial court for dismissal.
  - In general, an aggrieved party can seek relief only by commencing a new action for breach of the settlement agreement. A limited exception to this rule exists when a court order incorporates the terms of a settlement which require future acts.

Preserving Issues – Post-Trial Motions

- *Wolk v. School District of Lower Merion, --- A.3d ---, 2018 WL 6613750 (Pa. 2018)*
  - This dispute centered on a tax increase levied by a school district. The taxpayers sought injunctive relief to prevent implementation of the tax increase.
  - The trial court awarded the relief and the school district appealed. The plaintiffs sought to quash the appeal.
  - The issue considered by the Supreme Court was whether post-trial motions were required to preserve the appeal or whether appellant was entitled to proceed with an interlocutory appeal pursuant to Rule 311(a)(4).

Preserving Issues – Post-Trial Motions

- *Wolk v. School District of Lower Merion, --- A.3d ---, 2018 WL 6613750 (Pa. 2018)*
  - The trial court did not make an express distinction in its decision between preliminary or permanent injunctive relief, however, the Superior Court noted that the decision was "couched . . . in terms consistent with permanent injunction."
  - Notably, all the issues in the case were not resolved as a result of the hearing.
  - The Commonwealth Court agreed with the taxpayers and dismissed the appeal.

Questions?